

The new Impact Assessment Act: Implications for Alberta's Indigenous Peoples, Pipeline Approvals and Oil Sands Development



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Outline

1. Concepts – Environmental Assessment and Crown duty to consult and accommodate aboriginal peoples
 2. New Legislation Bill C-68 and Bill C-69
 3. Amendments to *Fisheries Act*
 4. Amendments to *Navigable Waters Protection Act*
 5. New *Impact Assessment Act*
 6. New *Canadian Energy Regulator Act*
 7. Implications – Indigenous Peoples, Pipe Line Approval and Oil Sands Development
- Questions?

- “environment” means the components of the Earth, and includes
 - (a) land, water and air, including all layers of the atmosphere;
 - (b) all organic and inorganic matter and living organisms; and
 - (c) the interacting natural systems that include components referred to in paragraphs (a) and (b).
- environmental services supports life – air, water and food
- environmental law – body of law that governs how people interact with other people with respect to the environmental impacts of human activity
- Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs. - Brundtland

- shared federal and provincial jurisdiction *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3, 1992, 1992 CanLII 110 (SCC)

Federal – federal lands, fisheries, navigation and inter-provincial works
Provincial – provincial lands, property, local matters
- environmental assessment [EA] is a “planning tool” used to assess the potential impacts on the environment *and* society from a project prior to granting approval for that development
- “cumulative environmental impacts” are the result of multiple development projects in a region that inform EA

Concepts

- Federal and provincial Crown have a constitutional duty to consult and accommodate aboriginal peoples when they contemplate making a decision affecting aboriginal interests, in potential or established aboriginal title, aboriginal rights or treaty rights, *prior* to making that decision:
 - established rights or title – consent or can be infringed for a compelling legislative purpose (*Sparrow Test*)
 - potential rights and title – dependent upon the strength of claim and the potential impact (*Haida, Taku River and Tsilhqot'in*)
 - Treaty rights – dependent on the Treaty interpretation (*Mikisew, Rio Tinto*)
- Policy is to delegate to project proponents consultation and accommodation in the EA but the Crown remains responsible to fulfill the duty to consult and accommodate.

New Legislation – Bill C-68 and Bill C-69

- Current legislation is the result of the omnibus budget-bill entitled *Jobs, Growth and Long-term Prosperity Act* (2012) that amended 109 pieces of legislation including the *Canadian Environmental Assessment Act*, *Fisheries Act* and *Navigable Waters Protection Act*
- New Federal Environmental law package:
 - Bill C-68 - An Act to amend the *Fisheries Act*
 - Bill C-69 - An Act to enact the *Impact Assessment Act* and the *Canadian Energy Regulator Act*, to amend the *Navigation Protection Act*
- Regulations are being consulted on.

Amendments to *Fisheries Act*

- Current legislation limited to protection of commercial, recreational and aboriginal fisheries – amendments remove those definitions
- Restores protections to the pre-2012 amendments:

35(1) No person shall carry on any work, undertaking or activity that results in the harmful alteration, disruption or destruction of fish habitat.
- fish habitat is “*water frequented by fish ...*”
- Permits with conditions can be obtained from DFO

Amendments to *Navigation Protection Act*

- Current legislation limits protections to navigable waters defined in a Schedule that lists 100 lakes and 64 rivers
 - Renamed: *Canadian Navigable Waters Act* and restores protections to the pre-2012 amendments by removing the Schedule – and restoring the common law definition of navigable waters [“canoe test”]
3. Except in accordance with this Act, it is prohibited to construct, place, alter, rebuild, remove or decommission a work in, on, over, under, through or across any navigable water.
- Permits with conditions can be obtained from Transport Canada

Legislation – CEAA-2012 / CEAA-1992

CEAA-2012 was enacted in 2012 to amend CEAA-1992 with significant changes, in order to to reduce the number and length of EA and “speed up” approvals:

- EA was limited to “designated projects” listed in the regulations rather than CEAA-1992 which applied to projects with a federal aspect unless excluded by the regulations
- EA consideration of environmental effects was specifically limited to effects on fisheries, aquatic species at risk, migratory birds, and aboriginal peoples, rather than any change the project may cause in the environment, including species at risk, health and socio-economic conditions as was the case under CEAA-1992

Legislation – CEAA-2012 / CEAA-1992

- EA were given to the Environmental Assessment Agency [Agency], National Energy Board [NEB] and Canadian Nuclear Safety Commission [CNSC] with legislated time limits for an EA in contrast to CEAA-1992 Federal Departments as Responsible Authority [RA] conducting EA with unlimited timeline

Agency standard EA within 365 days, Review Panel EA within 24 months, NEB EA within 15 months and CNSC EA within 24 months

- In EA aboriginal and public participation were limited to *interested parties* that were persons who were directly affected by the project or had relevant information or expertise, rather than “any person ... having an interest in the outcome of the environmental assessment for a purpose that is neither frivolous nor vexatious” under CEAA-1992.

New *Impact Assessment Act*

- Bill C-69 enacts the new *Impact Assessment Act* [IAA] to replace CEEA-2012. and continues the Environmental Assessment Agency under the name Impact Assessment Agency
- Contains the standard aboriginal notwithstanding mention in modern legislation in section 3 e.g. “nothing in this Act is to be construed as abrogating or derogating from the protection provided for the rights of the Indigenous peoples of Canada by the recognition and affirmation of those rights section 35 of the *Constitution Act, 1982*”

***However...* it is the first piece of Federal legislation to that focuses, amongst other priorities, on consideration of the impacts on aboriginal rights and decisions in the “public interest” which includes aboriginal rights as part of the public interest.**

New *Impact Assessment Act*

Purpose:

- changing “significant adverse impacts” to “adverse impacts”;
- removing the consideration of significance as formal part of an assessment – replaced with “extent”;
- adding in “adverse direct or incidental effects”;
- changing the purpose to “foster sustainability”;
- to protect not only the environment but also “the health, social and economic conditions that are within the legislative authority of Parliament from adverse effects caused by a designated project;”
- including consideration of “positive effects” in impact assessments;
- ensuring that opportunities are provided for meaningful public participation; and
- to ensure respect for aboriginal rights in the course of impact assessments and decision making.

New *Impact Assessment Act*

Expands the definition of environmental effects to include on federal lands, in another province or outside of Canada:

- changes to the environment or to health, social or economic conditions and the consequences of these with respect to a physical activity or a designated project, on (i) fish and fish habitat in the *Fisheries Act*, aquatic species, in *Species at Risk Act*, [not all species as in CEE-1992] migratory birds, as defined in in *Migratory Birds Convention Act, 1994*, and listed in Schedule 3 [presently empty]
- with respect to the Indigenous peoples of Canada, an impact - occurring in Canada and resulting from any change to the environment on (i) physical and cultural heritage, (ii) the current use of lands and resources for traditional purposes, or (iii) any structure, site or thing that is of historical, archaeological, paleontological or architectural significance; any change to the health, social or economic conditions of the Indigenous peoples of Canada; and
- any change to a health, social or economic matter that is within the legislative authority of Parliament that is set out in Schedule 3

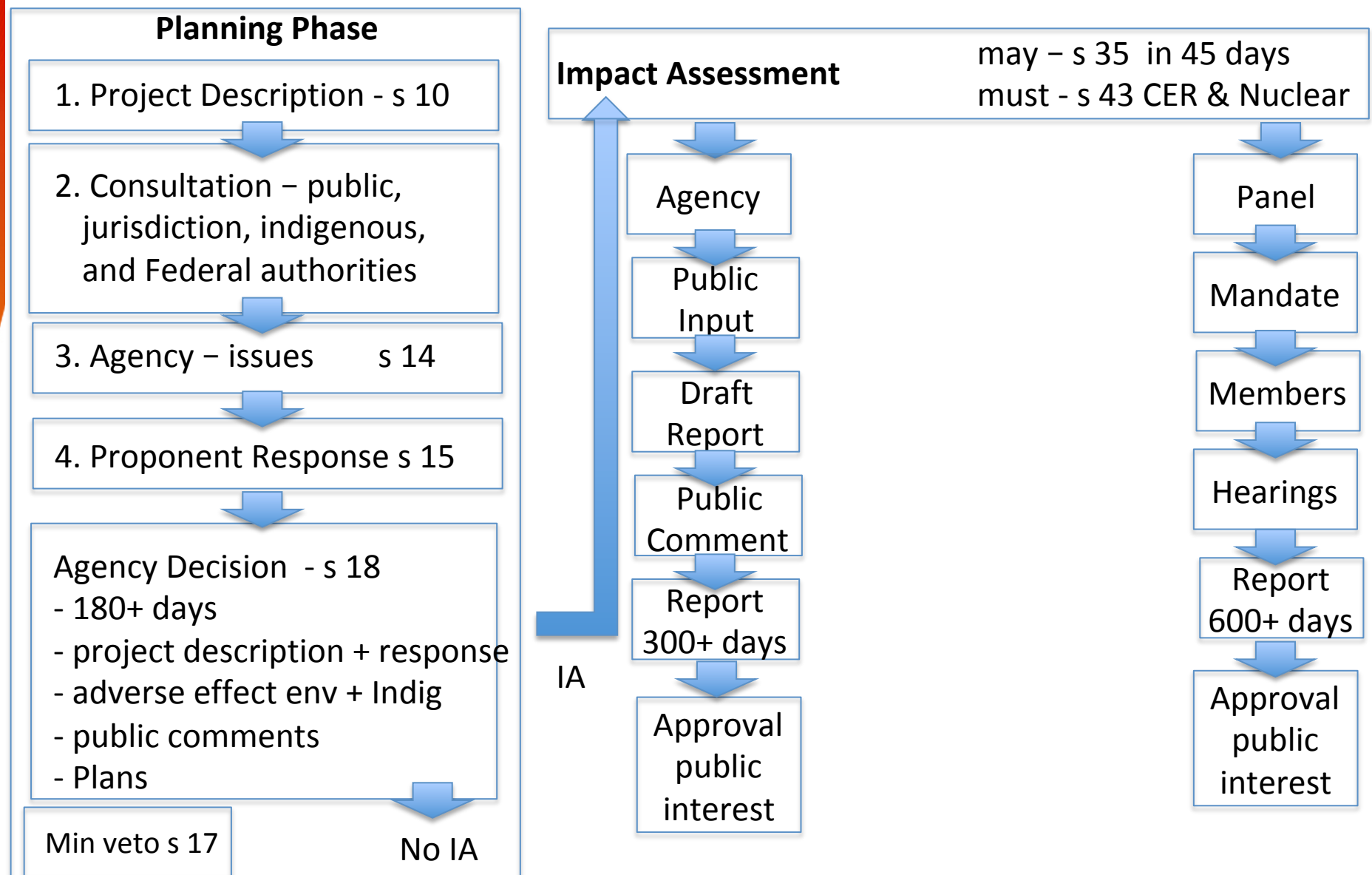
Other changes in definition:

- removing the definition of “interested party”
- “indigenous governing body” means a Band Council or other entity authorized to act on behalf of an Indigenous group, community or people that holds aboriginal rights;
- mitigation measures now include offset measures;
- “sustainable development” being replaced by “sustainability” which “means the ability to protect the environment, contribute to the social and economic well-being of the people of Canada and preserve their health in a manner that benefits present and future generations.”

Unchanged: EA only for “designated projects” in regulations ...
but...

- The Minister may, on request or her own initiative make a specific designation, outside of the regulations, as to projects whose activities “cause adverse effects within federal jurisdiction or adverse direct or incidental effects, or public concerns” related to those effects. The Minister cannot make this designation once the carrying out of the activity has substantially begun or a federal authority has given approval.

New *Impact Assessment Act*

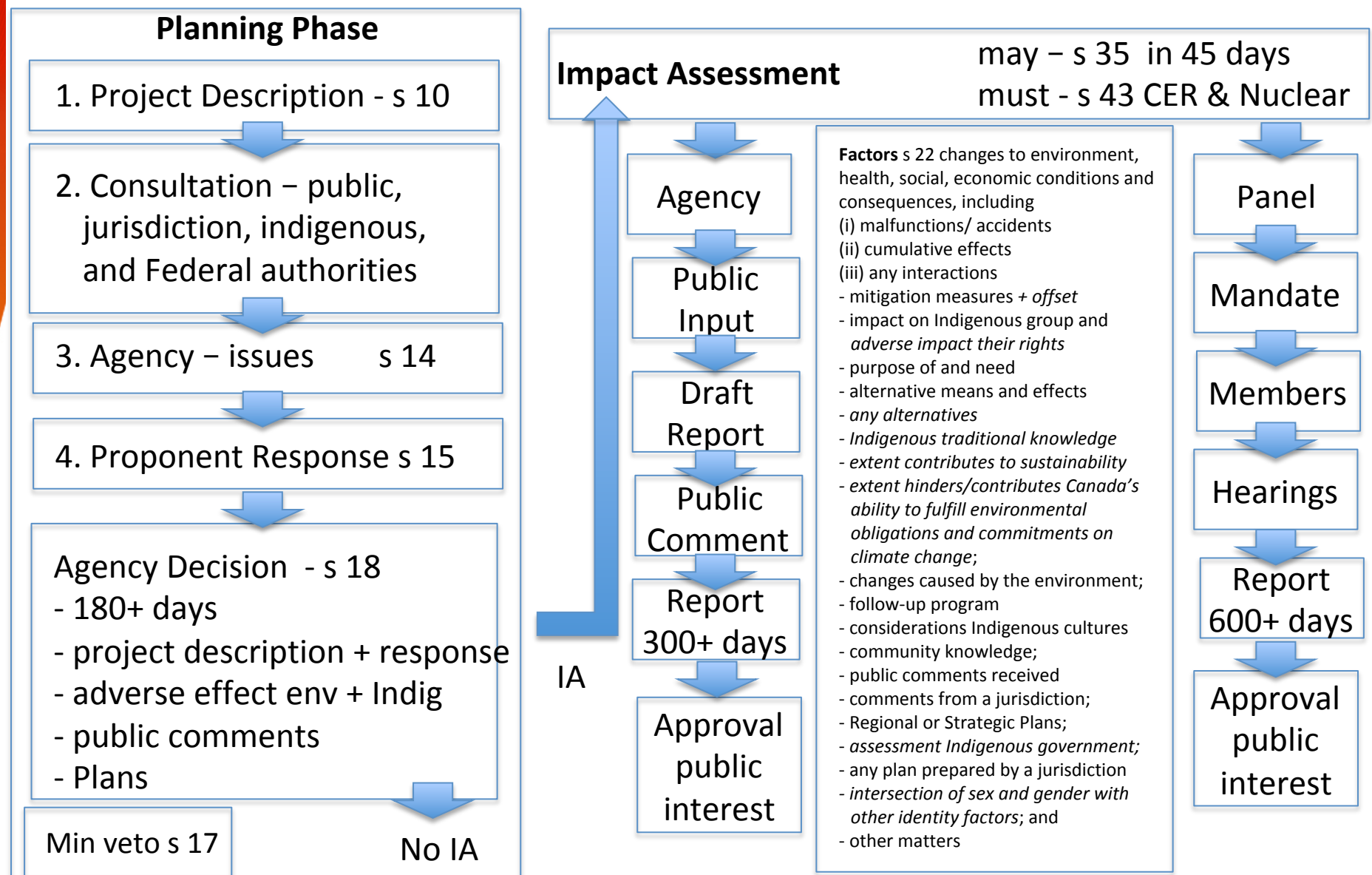


New *Impact Assessment Act*

Factors s 22

- changes to environment, health, social, economic conditions and consequences, including
 - (i) malfunctions/ accidents
 - (ii) cumulative effects
 - (iii) any interactions
- mitigation measures + *offset*
- impact on Indigenous group and *adverse impact their rights*
- purpose of and need
- alternative means and effects
- *any alternatives*
- *Indigenous traditional knowledge*
- *extent contributes to sustainability*
- *extent hinders/contributes Canada's ability to fulfill environmental obligations and commitments on climate change*
- changes caused by the environment
- follow-up program
- considerations Indigenous cultures
- community knowledge
- public comments received
- comments from a jurisdiction
- Regional or Strategic Plans
- *assessment Indigenous government*
- any plan prepared by a jurisdiction
- *intersection of sex and gender with other identity factors; and*
- other matters

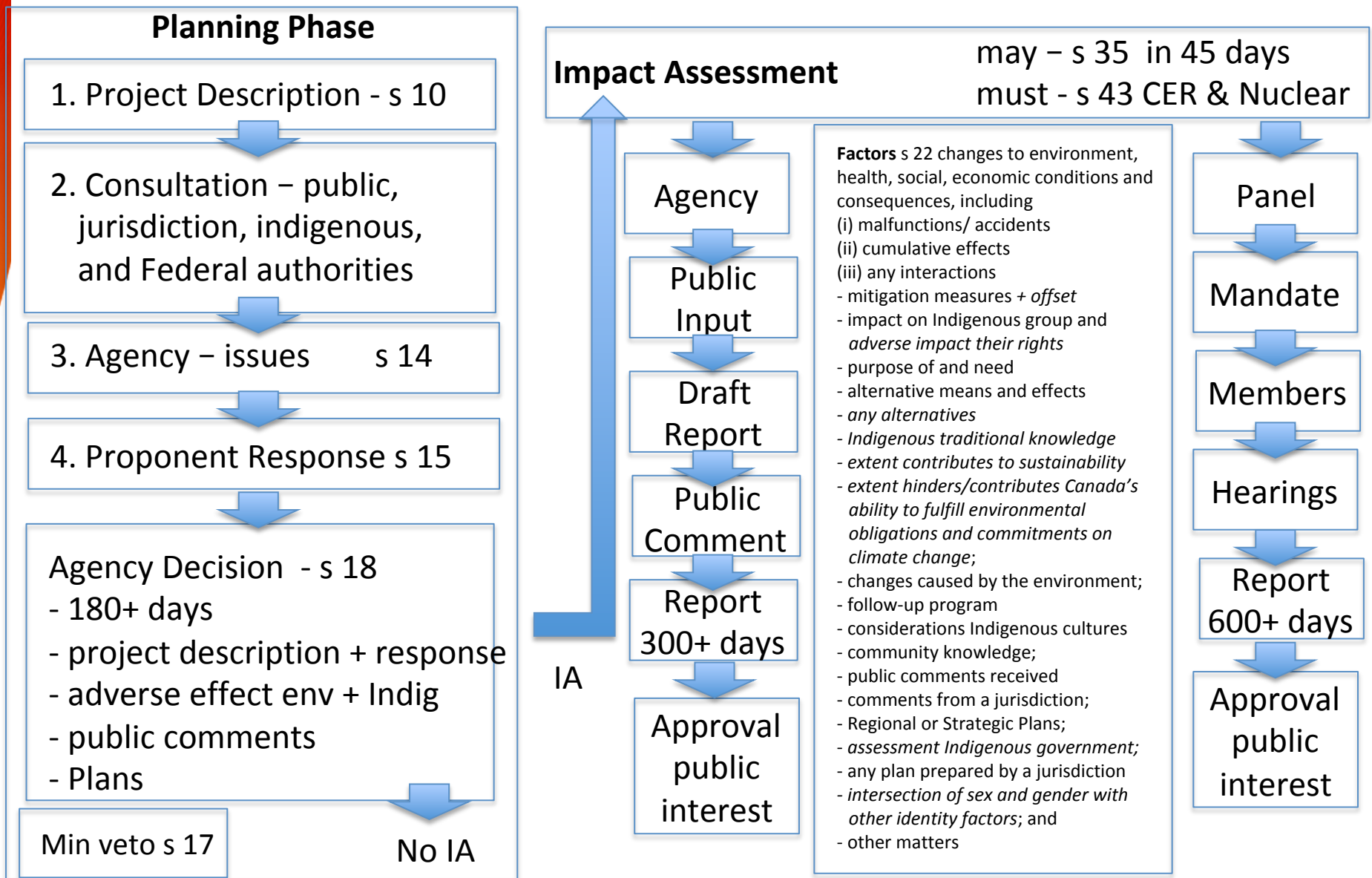
New *Impact Assessment Act*



Public Interest – s 63 IAA

- the extent to which the designated project contributes to sustainability;
- the extent to which the adverse effects within federal jurisdiction and the adverse direct or incidental effects that are indicated in the impact assessment report in respect of the designated project are adverse;
- the implementation of the mitigation measures that the Minister or the Governor in Council, as the case may be, considers appropriate;
- the impact that the designated project may have on any Indigenous group and any adverse impact that the designated project may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*; and
- the extent to which the effects of the designated project hinder or contribute to the Government of Canada's ability to meet its environmental obligations and its commitments in respect of climate change.

New *Impact Assessment Act*



New Canadian Energy Regulator Act

- Bill C-69 enacts the new *Canadian Energy Regulator Act* [CERA] to replace the *National Energy Board Act* and continues the National Energy Board under the name Canadian Energy Regulator [CER] with similar powers + mediation with consent of the parties
- CER must make its recommendation taking into account—in light of, among other things, any traditional knowledge of the Indigenous peoples of Canada that has been provided to the Commission and scientific information and data—all considerations that appear to it to be relevant and directly related to the pipeline/facility including:
 - (a) the environmental effects, including any cumulative environmental effects;

New Canadian Energy Regulator Act

- (b) the safety and security of persons and the protection of property and the environment;
- (c) the health, social and economic effects, including with respect to the intersection of sex and gender with other identity factors;*
- (d) the interests and concerns of the Indigenous peoples of Canada, including with respect to their current use of lands and resources for traditional purposes;*
- (e) the effects on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the Constitution Act, 1982;*
- (f) the availability of oil, gas or any other commodity to the pipeline;
- (g) the existence of actual or potential markets;
- (h) the economic feasibility of the pipeline;
- (i) the financial resources, financial responsibility and financial structure of the applicant, the methods of financing the pipeline and the extent to which Canadians will have an opportunity to participate in the financing, engineering and construction of the pipeline;

New Canadian Energy Regulator Act

- (j) *environmental agreements entered into by the Government of Canada;*
 - (k) *any relevant assessment referred to in [Regional and Strategic Plans] under the IAA; and*
 - (l) any public interest that the Commission considers may be affected by the issuance of the certificate or the dismissal of the application.
-
- CERA provides that all new pipeline projects are classified as “designated projects” under the IAA shall be subject to assessment by an IAA review panel rather than the CER.
 - However, that review panel will need to apply the same relevant factors as would the CER (at least with respect to the discharge of its responsibilities under CERA – the panel will also have responsibilities under the IAA).

New Canadian Energy Regulator Act

- IAA review panel for designated pipeline have one member from CER.
- Two reports - One report will fulfill the panel's responsibilities under the IAA and a second report will fulfill the panel's responsibilities under CERA [see above]

The list of “designated projects” is not yet available but the federal government has issued a consultation paper on the process that it intends to use to revise the current project list under CEAA. The current list, Regulations Designating Physical Activities, SOR/2012-147 includes new pipelines with a length of 40km or more.

Implications for Indigenous People in Alberta

- How does the Crown's duty to consult and accommodate aboriginal peoples fit into the IAA?
 - no direct jurisdiction for Agency/Panel but...
 - consideration of aboriginal rights?
- Consideration of aboriginal rights - extra expense and burden i.e. currently consideration of traditional uses only
- Risk procedural administrative standards override the reconciliatory purpose of aboriginal rights
- *LARP* as a Regional Plan – Jackpine Expansion
- assessment of the effects of the designated project that is conducted by or on behalf of an Indigenous governing body
- receipt of traditional knowledge

Implications for Pipeline Approvals

- dependent on regulations as to designated projects e.g. currently pipelines 40 km
- additional strictures
 - channelling economic benefits in the sustainability
 - GBA+
 - additional public participation
- assessment of the effects of the designated project that is conducted by or on behalf of an Indigenous governing body
- receipt of traditional knowledge

Implications for Oil Sand Development

- additional Federal approvals required with changes in *Fisheries Act* (DFO) and *Navigable Waters* (Transport Canada)
- new oil sands mines IAA but what about *in situ* developments
- dependent on regulations as to designated projects
- additional strictures
 - channelling economic benefits in the sustainability
 - GBA+
 - additional public participation
- assessment of the effects of the designated project that is conducted by or on behalf of an Indigenous governing body
- receipt of traditional knowledge

Additional Reading

Legislation:

Bill C-68 at <http://www.parl.ca/DocumentViewer/en/42-1/bill/C-68/first-reading>

Bill C-69 at <http://www.parl.ca/DocumentViewer/en/42-1/bill/C-69/first-reading>

AbLawg.ca posts: <https://ablawg.ca>

Martin Olszynski (February 15, 2018) “In Search of #BetterRules: An Overview of Federal Environmental Bills C-68 and C-69” at <https://ablawg.ca/2018/02/15/in-search-of-betterrules-an-overview-of-federal-environmental-bills-c-68-and-c-69/>

Nigel Bankes (February 15, 2018) “Some Things Have Changed but Much Remains the Same: the New Canadian Energy Regulator” at <https://ablawg.ca/2018/02/15/some-things-have-changed-but-much-remains-the-same-the-new-canadian-energy-regulator/>

Shaun Fluker (February 26, 2018) “Oversight and Enforcement in Bill C-69 Re: the *Impact Assessment Act* and the *Canadian Energy Regulator Act*” at <https://ablawg.ca/2018/02/26/oversight-and-enforcement-in-bill-c-69-re-the-impact-assessment-act-and-the-canadian-energy-regulator-act/>

AbLawg.ca posts (continued)

David V. Wright (February 27, 2018) “Indigenous Engagement and Consideration in the Newly Proposed *Impact Assessment Act*: The Fog Persists” at <https://ablawg.ca/2018/02/27/indigenous-engagement-and-consideration-in-the-newly-proposed-impact-assessment-act-the-fog-persists/>

Kristen van de Biezenbos (February 28, 2018) “Your Concerns Have Been Noted: Citizen Participation in Pipeline Regulatory Processes Under the Proposed *Impact Assessment Act*” at <https://ablawg.ca/2018/02/28/your-concerns-have-been-noted-citizen-participation-in-pipeline-regulatory-processes-under-the-proposed-impact-assessment-act/>

Alastair Lucas (March 1, 2018) “A Missed Opportunity to Strengthen Compliance and Enforcement under the *Federal Fisheries, Environmental Assessment and Canadian Energy Regulator Acts*” at <https://ablawg.ca/2018/03/01/a-missed-opportunity-to-strengthen-compliance-and-enforcement-under-the-federal-fisheries-environmental-assessment-and-canadian-energy-regulator-acts/>

AbLawg.ca posts (continued)

David Laidlaw (March 15, 2018) “Bill C-69, the *Impact Assessment Act*, and Indigenous Process Considerations” at

<https://ablawg.ca/2018/03/15/bill-c-69-the-impact-assessment-act-and-indigenous-process-considerations/>

Arlene Kwasniak (March 26, 2018) “Multi-Jurisdictional Assessment and Bill C-69 – The Further Fading Federal Presence in Environmental Assessment” at

<https://ablawg.ca/2018/03/26/multi-jurisdictional-assessment-and-bill-c-69-the-further-fading-federal-presence-in-environmental-assessment/>

Sharon Mascher (March 29, 2018) “Bill C-69 and the Proposed *Impact Assessment Act*: Rebuilding Trust or Continuing the “Trust Us” Approach to Triggering Federal Impact Assessment?” at

<https://ablawg.ca/2018/03/29/bill-c-69-and-the-proposed-impact-assessment-act-rebuilding-trust-or-continuing-the-trust-us-approach-to-triggering-federal-impact-assessment/>

AbLawg.ca posts (continued)

Martin Olszynski, Brett Favaro and Nicolas Lapointe (April 16, 2018) “Asking the Right Questions about Amendments to the *Fisheries Act*” at <https://ablawg.ca/2018/04/16/asking-the-right-questions-about-amendments-to-the-fisheries-act/>

Dave Poulton (April 17, 2018) “Disappointment at the Bank: The Fish Habitat Banking Provisions of Bill C-68” at <https://ablawg.ca/2018/04/17/disappointment-at-the-bank-the-fish-habitat-banking-provisions-of-bill-c-68/>

Bonus post:

Nigel Bankes (April 18, 2018) “A Bill to Restrict the Interprovincial Movement of Hydrocarbons: a.k.a. Preserving Canada’s Economic Prosperity [Act]” at <https://ablawg.ca/2018/04/18/a-bill-to-restrict-the-interprovincial-movement-of-hydrocarbons-a-k-a-preserving-canadas-economic-prosperity-act/>

Canadian Institute of Resources Law (CIRL)

<http://cirl.ca>

Publications

<http://cirl.ca/publications>

Occasional Papers

David Laidlaw and Monique Passelac-Ross (2014) *Alberta First Nations Consultation & Accommodation Handbook* (Occasional Paper #48)

<https://dspace.ucalgary.ca/bitstream/handle/1880/50216/ConsultationHandbookOP44.pdf;jsessionid=57C1A4AC2DEE9AE7DBF44691BA84AD50?sequence=1>

David Laidlaw (2016) *Alberta First Nations Consultation & Accommodation Handbook – Updated to 2016* (Occasional Paper #53) at

<http://www.cirl.ca/files/cirl/consultationupdateop53.pdf>